

# European Union

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region and its policies in international criminal policy are emulated by the rest of the hemisphere, its signing may be important.

## **C. European Union: Draft Convention on the Establishment of a European Police Office (Europol)**

By André Klip<sup>1</sup>

Following the treaty of European Union of Maastricht (7 February 1992) the Member States of the European Union are negotiating a Union-wide system for exchanging information within a European Police Office. Under the German Presidency (second half of 1994) negotiations have continued.

In June 1993 the Council established a provisional European Drug Unit (EDU). The Essen European Council (December 1994) expanded its jurisdiction by transferring additional tasks to the provisional EDU with regard to traffic in human beings and illegal trafficking in nuclear material. The Europol Convention is also intended to fill the legal gap for the EDU, which operates without any legal basis.

The Draft European Convention (dated October 10, 1994) contains various important elements. Article 2 paragraph 1 describes Europol's objectives in a rather vague way: "The objective of Europol shall be, within the framework of co-operation between the Member States pursuant to Article K.1(9) of the Treaty on European Union, to improve, by means of the measures referred to in this Convention, the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as, owing to the scale, significance and consequences of the offense, to require a common approach by the Member States."

Paragraph 2 of Article 2 demonstrates that the objectives of Europol might be expanded progressively: "In order to achieve progressively the objectives mentioned in Article 1, Europol shall initially act to prevent and combat unlawful drug trafficking, crime connected with nuclear and radioactive substances, illegal immigrant smuggling, motor vehicle crime (in particular trafficking to other States and theft of goods in transit) and illegal money-laundering activities in connection with these forms of crime. Under the procedure laid down in Title IV of the Treaty on European Union, the Council may unanimously decide to instruct Europol to deal with other forms of crime listed in the Annex to this convention or specific manifestations thereof. (...)" The description of the crimes for which Europol may have competence is undetermined to the extent that national parliaments do not know in advance the scope of the annex which they are approving.

In the framework of these objectives Europol shall have the following tasks (Article 3 paragraph 1):

- "1. to facilitate exchange of information between the Member States,
2. to collect, collate and analyze information and intelligence,
3. to notify the competent authorities of the Member States without delay via the national units referred to in Article 4 of the information concerning them and of connections between criminal offenses detected,
4. to support national investigations by forwarding all relevant information to the national units,
5. to maintain computerized collections of information containing data (...)."

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Article 3 paragraph 2 provides that, "In order to improve the effectiveness of the competent authorities in the Member States through the national units in the framework of the objectives pursuant to Article 2, Europol shall furthermore have the following additional tasks:

1. to develop expertise in the investigative procedures of the competent authorities in the Member States and to provide advice on investigations;
2. to provide strategic intelligence to assist and promote efficient and effective use of national operational resources;
3. to prepare general situation reports."

Article 3 paragraph 3 states: "In addition, Europol may within the framework of its objectives under Article 2 and in accordance with its staffing and budgetary possibilities, assist Member States through advice and research in the following areas:

1. training of members of their competent authorities;
2. organization and equipment of those authorities;
3. crime prevention methods;
4. technical and forensic police methods and investigative procedures."

Each Member State must establish a national unit, which will be the only liaison body between Europol and the competent authorities in the Member States (Art. 4). Each national unit shall second at least one liaison officer to Europol (Art.5).

Europol will maintain a computerized collection of information: an information system with restricted and precisely defined content which will allow rapid reference to the information available to the Member States and Europol (Art.6-8); and work files for the purposes of analysis.

Article 10 gives Europol the power to store, amend and utilize data on suspects, witnesses, possible victims, contacts and escorts and persons "who may provide information on criminal offenses." Article 10a states that an index system will be created on the data stored in these files, which will contain exclusively key-words.

Still in discussion are the rules on the use of data.<sup>15</sup> The question is whether Member States will have direct access to Europol's files or only after prior consent (need to know principle). This is a very important matter because it could affect the effectiveness of Europol tremendously. Direct access could lead to a situation in which Member States are very reluctant to give information, because other States might use it and "spoil" their case.

Under certain conditions, individuals have a right to information concerning data relating to his/her person by Europol and the purpose of storage (Art.17). This may lead to correction and deletion of data files (Art. 18). Supervisory bodies will be established in order to determine whether the rights of the data subject are violated by the processing and utilization of the data held by Europol (Art. 21-22). Europol will take measures with regard to data security (Art. 23). Europol will be headed by a Director who will be accountable to a Management Board (Articles 26-17).

Article 29 states that members of Europol organs must not disclose any facts or information which come to their knowledge in the performances of their duties or the exercise of their duties to any unauthorized person or to

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<sup>15</sup> INTERNATIONAL ENFORCEMENT LAW REPORTER 1995, and Victor Smart, *French Poised to Deal Fatal Blow to Europol*, THE EUROPEAN, Nov. 25- Dec. 1, at 1, col. 1.



the public. The members of Europol organs may not give evidence in court or in parliament without permission of the Director of Europol.

A huge gap is found when it comes to parliamentary control. Article 31 states that the Presidency of the Council will inform the European Parliament annually through a report. Europol will be neither accountable to the European Parliament nor to the national parliaments of the Member States. National parliaments only have indirect influence through the respective representatives of their governments in the Council and in the Management Board of Europol. Decisions of the Council (important because of expanding the objectives of Europol) will be taken unanimously. Decisions of the Management Board (day-to-day affairs) will be taken by two-thirds majority.

The negotiating parties seem to have a difference of opinion concerning the way in which disputes between the Member States or between Member States and Europol are to be solved. With regard to the settlement of disputes between Member States, the United Kingdom seems to believe that the matter will be discussed in the Council with the aim of finding a settlement. In contrast, other Member States would like to refer the matter to the European Court of Justice. Another point of discussion is the role of the European Court of Justice in proceedings of individuals against Europol (or against a national unit) before national courts. Some countries favor a provision in which national courts refer to the European Court of Justice for a preliminary ruling, when a question of interpretation<sup>21</sup> of the Europol Conventions put to a national court. Linked with this difference of opinion on the role of the Court of Justice is a discussion on the question whether or not reservations to the Convention will be permissible.

## **D. United Kingdom: Enquiry into the Draft Europol Convention by the House of Lords (December 1994)**

by André Klip

Sub-Committee E (Law and Institutions) of the House of Lords Select Committee on the European Communities have decided to carry out an enquiry into the Draft Convention to establish Europol. The Sub-Committee is concerned about the intergovernmental nature of the negotiations. This means that Europol is being developed largely in secret and without public discussion of the implications. The Sub-Committee requested selected organizations and witnesses to assist in the enquiry, which is scheduled for January and February 1995.

The Sub-Committee expresses its concern about:

- "the omission of terrorist offenses from the serious organized crimes to be covered;
- the possibility that Europol's functions and powers could be extended without the consent of national Parliaments;
- the lack of effective remedies for the individuals who may suffer in consequence of inaccurate or unauthorized processing of personal data, and;
- the institutional arrangements particularly in regard to settlement of disputes among Member States and questions of interpretation of the Convention."

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<sup>21</sup> The vagueness and broadness of various definitions may be a source of trouble when it comes to applying the Convention in actual practice.